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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Marriage of E. and STEPHEN P.	B243469 (Los Angeles County Super. Ct. No. BD415568)
E. P., Respondent, v. STEPHEN P., Appellant.	

APPEAL from an order of the Superior Court of the County of Los Angeles, John L. Henning, Judge. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Appellant.

Noelle M. Halaby for Respondent.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of **FACTUAL AND PROCEDURAL BACKGROUND, parts B, C, D, E and F.**

INTRODUCTION

Stephen P. (father), the adoptive father of S.P. (the minor), appeals from the trial court's order granting the petition of the adoptive mother of the minor, E.P. (mother), to terminate father's parental rights to the minor under Family Code section 7827[1] (mental disability). According to father, the trial court committed per se reversible error when it failed to order and consider an investigation by a licensed clinical social worker under section 7850 and a report by that social worker under section 7851. Father also contends that because it is only in rare and exceptional cases that a trial court should terminate parental rights when no adoption is pending, the trial court erred by terminating parental rights here as no adoption was pending. Father further argues that the trial court erred by failing to consider less drastic alternatives to terminating his parental rights.

We hold that father forfeited on appeal his contentions concerning the application of sections 7850 and 7851 by failing to raise the issue in the trial court; there is an insufficient showing of ineffective assistance of counsel in connection with such forfeiture; in any event, father failed to demonstrate that sections 7850 and 7851 applied to mother's petition; and if they did apply, father failed to show that he suffered prejudice from the trial court's failure to order and consider the investigation and report required under those sections. We further hold that substantial evidence supports the trial court's finding that terminating father's parental rights was in the best interests of the minor, as well as the trial court's implicit conclusion that no less drastic alternatives to termination were reasonably available. We therefore affirm the order terminating father's parental rights.

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[1] All further statutory references are to the Family Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

A. Summary

Mother and father married and adopted the minor. Prior to the marriage, father suffered from mental illness, but had taken medication that allowed him to function normally. Shortly after they adopted the minor, father stopped taking his medication. As he failed to take medication, his mental condition deteriorated to the point where it seriously impacted his relationship with mother and the minor and resulted in restraining orders being issued. On one occasion, father appeared unannounced at mother's home and tried to force her and the minor into his vehicle; in the resulting struggle, the minor fell from mother's arms and fractured his skull. Mother ultimately filed a petition for dissolution of the marriage and was awarded sole custody of the minor.

Mother also filed an initial petition to terminate father's parental rights pursuant to section 7827.[2] In response to the petition, the trial court appointed a psychologist and a psychiatrist to examine father and prepare reports with their diagnoses and prognoses. According to mother, after she and the minor moved out of state, father suffered a criminal conviction for the attempted murder of his mother. Nevertheless, mother later

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[2] Section 7827 provides in pertinent part: "(a) 'Mentally disabled' as used in this section means that a parent or parents suffer a mental incapacity or disorder that renders the parent or parents unable to care for and control the child adequately. [¶] (b) A proceeding under this part may be brought where the child is one whose parent or parents are mentally disabled and are likely to remain so in the foreseeable future. [¶] (c) Except as provided in subdivision (d), the evidence of any two experts, each of whom shall be a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or under Section 6750 of the Welfare and Institutions Code, a licensed psychologist who has a doctoral degree in psychology and at least five years of postgraduate experience in the diagnosis and treatment of emotional and mental disorders, is required to support a finding under this section. In addition to this requirement, the court shall have the discretion to call a licensed marriage and family therapist, or a licensed clinical social worker, either of whom shall have at least five years of relevant postlicensure experience, in circumstances where the court determines that this testimony is in the best interest of the child and is warranted by the circumstances of the particular family or parenting issues involved."

stipulated with father to dismiss her petition to terminate father's parental rights in exchange for father's agreement to undergo treatment and take medication for his mental illness. Mother then allowed father to reestablish a relationship with the minor, who was in therapy.

Shortly after entering into the stipulation, father again refused to take his medication and his mental condition began to deteriorate, leading mother to reinstate her petition to terminate father's parental rights. After the filing of the reinstated petition to terminate parental rights, the trial court appointed a psychologist and two psychiatrists to evaluate father's mental condition. All of the experts reported that father was mentally disabled within the meaning of section 7827, and that if he continued to refuse to comply with medical treatment recommendations, he would remain disabled for the foreseeable future. At trial on the reinstated petition, the testimony of the experts was consistent with their reports. The trial court concluded that "section 7827 applies to [father]. All experts agree that the best interest of the [minor] is that the parental rights of [father] be terminated. . . . Therefore, the court finds that section 7827 of the Family Code applies to [father] and [father's] parental rights are terminated."

B. Mother's Testimony

Mother married father in 1999. Prior to their marriage, father informed mother that he suffered from mental illness, but prior to the adoption of the minor, father took medication regularly and behaved normally. During the proceedings relating to the minor's adoption, the trial court questioned father about his mental illness and willingness to take his medication. Father confirmed that he would always take his medication and stay mentally healthy. Father and mother adopted the minor in or about 2002.

Shortly after the adoption, father began to deteriorate mentally because he refused to take his medication. Father continued to refuse to take his medication for about two years. During that time, mother observed father's mental condition become progressively worse. According to mother, father "was erratic with money, erratic with driving." He

began to "smoke pot, start[ed] drinking, [conduct that was] out of character . . . ." Around October 2004, mother finally decided to separate from father when the minor was two and one quarter years old. Following the separation, mother obtained restraining orders against father, but he repeatedly violated those orders.

On one occasion, father came to mother's house and asked to play with the minor, who was sick. While mother was occupied in the kitchen, father took the minor outside to play in the rain. When mother asked father to come inside, he refused. When she asked father again to bring the sick minor inside, father locked himself and the minor in the minor's room and "held him captive . . . ." Father's behavior prompted the police and fire departments to intervene.

On a subsequent occasion in 2005, mother had just come out of the shower into the living room to check on the minor. But "[s]omething didn't feel right." There was a man standing in the living room that mother did not recognize and the front and back patio doors were wide open. Because mother had not seen father for several months, it took her "a minute to figure out" that the man in the living room was father. The minor had climbed on the back of the couch and appeared scared "like a cat with the cat's back up." When mother asked father why he was there, he told her he had come to protect her, that she could not stay there, and that she had to come with him. Father took the minor from mother and "dragged" mother, who was only wearing her bath towel, and the minor out of the house through the front door. Mother screamed for help as father "literally threw [the minor] in the back of the SUV." Mother tried to prevent father from taking the minor by "grabb[ing] the steering column," which broke. While father was distracted, mother "grabbed [the minor] and started to run up the hill." Father pursued and pushed mother causing the minor to fall from her arms and hit his head on the concrete. The minor fractured his skull and "[t]here was just a lot of bleeding and bruising." Father was arrested and charged with causing great bodily injury to a child.

In April 2006, mother filed an amended petition for dissolution of marriage. In December 2006, the trial court entered a judgment on the amended petition that, inter

alia, awarded sole custody of the minor to mother. In December 2006, mother filed an initial petition to terminate father's parental rights pursuant to section 7827.

In 2007, mother and the minor moved to North Carolina. At the time of mother's relocation, father was in jail. After mother's relocation, father was arrested for the attempted murder of his mother. Mother said father was subsequently convicted of attempted murder.

In June 2010, mother entered into a stipulation with father in which she agreed to dismiss her petition to terminate father's parental rights in exchange for father's agreement to undergo treatment and take medication for his mental illness. Mother entered into the stipulation because father had been taking his medication and she had therefore allowed him to have contact with the minor. Mother allowed the minor to reestablish a relationship with father when the minor was seven and a half years old, in or about early 2010.[3] The relationship lasted for about eighteen months. During that time, the minor was in therapy.

After mother entered into the stipulation with father in June 2010 to dismiss her petition to terminate parental rights, she attempted to exercise her right under the parties' stipulation to request that father undergo testing to ensure that he was taking his medication. In response, father told mother that there was nothing wrong with him and that he did not need any medication. During the last six months of the minor's reestablished relationship with father, the minor witnessed behavior by father that was indicative of mental illness. Father's conversations with the minor "were erratic. He would tell [the minor] that he was the big bad boss daddy [and] that he worked for the CIA. [Father told the minor that] if he couldn't be with [the minor], he was probably on a CIA mission. But according to mother, father "didn't work for the CIA ever." Father would also leave voice messages for the minor "about his working for the CIA. He would leave messages for [the minor] that were inappropriate about [the minor's] body

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[3] The minor was born in August 2002 and would have been seven and a half years old in or about February 2010. But mother later testified that father reestablished contact with the minor beginning in February 2009.

and aging and what would happen . . . [¶] . . . Some of father's messages made absolutely no sense. . . . Some of them were that [father and the minor] could live in a tent. They could be happy."

C. Reinstatement of Petition to Terminate Father's Parental Rights

In May 2011, based on mother's concerns about father's refusal to comply with the parties' stipulation and take his medications, the trial court appointed a psychologist, Dr. Kaser-Boyd, to evaluate father. Based on Dr. Kaser-Boyd's September 2011 evaluation discussed below, the trial court reinstated mother's petition to terminate father's parental rights in October 2011. Mother wanted to terminate father's parental rights to the minor "[b]ecause [father was] not a stable person mentally and emotionally. He [had] been in and out of jail and mental hospitals." Mother further explained that the persons she had selected to act as guardians for the minor in the event she passed away before the minor turned 18 would not agree to act in that capacity if father continued to have parental rights. The guardians were concerned that any money mother would leave for the minor's care after her death would be depleted by litigation over father's parental rights to the minor.

Mother believed that father could hurt the minor. She was concerned about the minor's safety because of father's mental illness and his unpredictable behavior toward the minor. The minor had no contact with father from and after April 2011. According to mother, at the time of the July 2012 trial, the minor was doing "amazing."

D. Expert Reports and Testimony

1. Dr. Kaser-Boyd

In September 2008, in connection with mother's initial petition to terminate parental rights under section 7827, the trial court had appointed Dr. Kaser-Boyd and Dr. Markman, a psychiatrist, to prepare the reports required by that section. In her July 2009 report, Dr. Kaser-Boyd opined, inter alia, as follows: "[Father] has a long history of

psychiatric symptoms. These date back to at least 1995, and they appear to have been under control when he was consistent with taking medications . . . . By history, when he goes off the medications [which have included an antipsychotic medication and one for mood disorder], he becomes grossly psychotic. In the past, this has resulted in several involuntary psychiatric hospitalizations, being found incompetent to stand trial, and a sojourn at Patton State Hospital. Even after this, there has been a more recent event of assault on his 60-year-old mother. His tendency to assault family members when psychotic creates a potentially dangerous situation for [the minor]. [¶] Currently [father] is being followed by the courts and must take medications. He states that he knows he needs to take the medications, and knows that his behavior 'gets bizarre' when he goes off the medication regimen. I think it is clear that [father] is mentally disabled within the meaning of Family Code section 7827, but he may be able to participate in the care and control of his son if he becomes more psychiatrically stable. His mental state could be stable if he complies with treatment recommendations. Since he managed to remain stable for about ten years on this regimen, it seems possible, perhaps even likely, that he can be stable in the future."

In May 2011, after father raised an issue with the trial court about being forced to comply with the terms of the parties' stipulation, the trial court again, as noted above, appointed Dr. Kaser-Boyd to evaluate father. In her September 2011 report, Dr. Kaser-Boyd opined, inter alia, as follows: "This is a very sad case, indeed, with a father who is very intelligent and when not in the throes of a manic episode, is an attractive and personable man. It seems clear to me that he really loves his son. Unfortunately, however, he is not accepting of his diagnosis of need for medication(s), and when he goes off his medications, it does appear that he decompensates. By 'decompensate' I mean his thinking becomes confused and his emotions seem to spiral out of control. A good example of this is the series of phone messages where he alternates between kind and loving, funny, and affectionate versus angry and threatening. This may be influenced to some extent by substance abuse but I do not know to what extent."

During the July 2012 trial on mother's reinstated petition, Dr. Kaser-Boyd testified, in part, as follows: "Q. Dr. Kaser-Boyd, after you completed your report—your first report . . . on July 11th, 2009, when did you, in fact, see [father]? A. I saw him March 25th, 2009. Q. And you subsequently saw him in July of 2011; is that right? A. Yes. Q. And when you saw him in July 2011, did you form an opinion as to whether or not he had remained compliant with any medication or treatment regimen? A. I did form an opinion based on what he told me. Q. What did he tell you? A. He told me that he didn't feel he should be forced to take medication. Q. And what was your opinion based upon that? A. Well, I was fearful that he was decompensating, and becoming manic again. Q. The way that [father] presented to you in July 2011, was he capable to act as a parent to [the minor] at that point in time? A. I did not think he was. Q. You say you last saw him, clinically, a year ago, correct? A. Yes. Q. At that point you thought he was mentally disabled to care for [the minor]. A. Yes. Q. Do [you] believe he is likely to remain so in the foreseeable future if he does not take medication? A. Yes, I do."

2. Dr. Ward

In December 2011, the trial court appointed Dr. Ward, a psychiatrist, to prepare a report as required under section 7827. In January 2012, Dr. Ward submitted a report that concluded, inter alia, as follows: "In summary and conclusion, [father] is clearly chronically, severely mentally disabled, such that he could not and should not be entrusted with the independent care, control and custody of a child. Nor are there any data to suggest that his condition is amenable to any sort of quick, significant change. In fact, his lengthy very troubled and problematic history contradicts such, and his prognosis therefore remains quite poor, again, with fairly obvious implications to the issue in this case."

At the July 2012 trial on mother's reinstated petition, Dr. Ward testified, in part, as follows: "The Court: Did you form an opinion with respect to whether or not he comes within the meaning of section 7827? [¶] The Witness: Yes, I did. [¶] The Court: What is your opinion? [¶] The Witness: That he does come within that section. [¶] The

Court: What is the reason for your opinion? [¶] The Witness: That he does have a severe mental disorder or incapacity that relates to his ability to adequately and appropriately, or properly, exercise the care and control of a child." [Redirect Examination by mother's counsel] [¶] Q. You testified that [father] was diagnosed with bipolar or mood disorder; is that right. A. Yes. Q. On page 18 of your report, you indicated that he had a number of different diagnoses that also included the schizophrenia and schizo effective disorder; is that right? A. Yes. Q. And do you know of any fact to suggest that [father] could exercise the care and control over his child in the foreseeable future? [¶] . . . [¶] The Witness: Yes. Yes, I think the data would say he is not going to be able to do that in the foreseeable future. [¶] [Petitioner's Counsel]: It's also your distinct opinion that he should not be entrusted with the independent care and control of his child; isn't that right? Witness. Yes."

3. Dr. Markman

In connection with mother's initial petition to terminate father's parental rights, a psychiatrist, Dr. Markman, prepared a January 2009 report for the trial court in which he concluded as follows: "Based on this evaluation and a review of the available record, I would make a preliminary diagnosis of:

AXIS I: R/O BIPOLAR-l DISORDER WITH MEDICAL NON-COMPLIANCE vs. INTERMITTENT EXPLOSIVE DISORDER vs. DRUG INDUCED MOOD DISORDER, POLYSUBSTANCE ABUSE AND DEPENDENCE, MARIJUANA, MUSHROOMS, LSD, BY HISTORY.

AXIS II: PERSONALITY DISORDER, NOS, WITH CYCLOTHYMIC AND AGGRESSIVE FEATURES.

With respect to his status within the meaning of Section 7827 Family Code, [father] does have an underlying mental disorder, but in his current stable condition, on medication, he has the capacity to care for and control his son adequately so long as he remains in treatment and on medication. Based on his history, however, there is a risk of future non-compliance with treatment and medication, which would alter this determination. He is

also clearly capable of knowingly and willingly entering into a stipulation with his ex-wife to terminate his parental rights. It is imperative that he remain in treatment, take his medication and abstain from taking abusable substances."

In December 2011, Dr. Markman was again appointed by the trial court to prepare a report pursuant to section 7827 in connection with mother's reinstated petition. Dr. Markman's report concluded, inter alia, as follows: "Based on this evaluation, I would make a preliminary diagnosis of:

AXIS I: R/O DELUSIONAL DISORDER vs. PSYCHOSIS, NOS.

AXIS II: PERSONALITY DISORDER, NOS, WITH PARANOID, IMPULSIVE AND INADEQUATE FEATURES

[Father] demonstrates an unstable, brittle personality, which renders him prone to acting out in unforeseen, unpredictable ways. He requires ongoing therapy with a psychiatrist who could prescribe and monitor needed psychotropic medication and further stabilize his condition. Though he does not require psychiatric hospitalization at this time, he clearly could benefit from placement in an assisted living facility, as he presently appears incapable of handling the simple day to day tasks of life. He clearly has a mental disorder, which currently impairs his ability to care for or control his son adequately."

During the July 2012 trial on mother's reinstated petition, Dr. Markman testified, in part, as follows: "Q. Do you believe [father]'s mental disability is likely to remain so in the foreseeable future? A. I think the condition will remain. Whether it can be stabilized further is subject as to adequate ongoing treatment, along with compliance of the patient. 80 percent of psychiatric patients are noncompliant with medication. By noncompliant, they stop taking medications to some degree. There are side effects that are intolerable to them. They don't like the idea of medication affecting their brain. Q. When you did your first report, doctor, did it appear that [father] in the earlier report in 2009, was again benefiting from taking medication? A. Yes. Q. And when you say you saw him again the second time, in December 2011, his condition was not the same? A. His condition had deteriorated, in my opinion. . . . Q. Do you have any, based upon your two reports now, do you have any conclusion that you can offer as to why he would

have been so different in between the two reports? A. The prominent conclusion would be noncompliance with treatment. Q. In other words, he was not taking his medication? A. On a regular basis, yes. His medication has to be taken daily. Q. And in your opinion, if he does not take the medication daily, his condition can deteriorate? A. Worse than it was when I saw him. Q. Okay. And you base that opinion on your experience as a psychiatrist and medical doctor, correct? A. Yes. Q. And now, based on the history that was presented in the 2009 evaluation having to do - - A. Plus the fact, that I had that information in my 2011 evaluation that he [had] been hospitalized on at least 10 occasions, which is also a revolving door situation of getting stabilized, being released, become noncompliant, and being rehospitalized." [¶] . . . [¶] [By the Court] Q. Once again, calling your attention to Family Code section 7827, mentally disabled as used in this section means that a parent or parents suffer a mental incapacity or disorder that renders parent or parents unable to care and control the child adequately. [¶] Is there anything about that section you don't understand? A. No. Q. Based upon your experience as a psychiatrist and a lawyer, is there anything that's ambiguous or difficult to determine based-- A. Not in my opinion, no. Q. So you clearly understand the section, correct? A. Yes. Q. And understanding the section, once again you feel that [father]'s condition applies to that section? A. Based on my last examination, yes. Q. Was the primary reason being that he had deteriorated from the time you first examined him? A. I didn't know that at that time, but he clearly deteriorated from the time of my-- Q. And you indicated in your testimony today that you attributed that to the fact that he was not regularly taking his medication? A. That's the most probable explanation. Q. And were he to continue not to take his medication, then he would fall within the section of 7827? A. He would continue to remain within the section."

E. Father's Letters to the Minor

Mother introduced four handwritten letters from father to the minor as examples of father's inappropriate communications with the minor that were rambling and often incomprehensible, and contained repeated references to father's purported involvement in the CIA, as well as vulgar, profane language and references to nudity. Envelopes for three of the letters indicate that they were mailed in January 2012.

F. Trial Court's Ruling

After hearing argument, the trial court stated its decision for the record as follows: "Every expert that has talked to [father] has been impressed by the fact that he is, I can quote, a very charming individual. I found him to be so as well when he is on his medication. He is a very intelligent and likeable person. [¶] But as Dr. Ward has said, he is clearly chronically, severely, mentally disabled, such as he could not, and should not be entrusted with the independent care and control and custody of a child. Nor is there any data to suggest that his condition is amenable to any sort of quick significant fix. In fact his lengthy very troubled and problematic history contradict that and his prognosis remains quite poor. And that's what this is all about here. [¶] . . . [¶] As [petitioner's counsel] has pointed out, a child is entitled to stability by a parent that he or she can depend on to be there for them in not only happy times, but distressing difficult times. [¶] When we talk about best interest, we have to really look at what is in the child's best interest. [Defense counsel] makes arguments that it's not really public policy to terminate somebody's parental rights when there's no adoption pending, unless there's some really grave reason to do that. [¶] This case clearly speaks out to that fact. For [father] to continue to be in [the minor's] life is a clear detriment to [the minor]. [¶] [Father] is a life that is lost. Maybe he will come back someday. He is a very intelligent person who is a lost life. Society loses a lot by not having him being present in it. I do not want another lost life in the case. [¶] [The minor] has a right to have an independent life of his own, to be able to grow with a stable relationship. And if [father] were to be a part of that relationship, it gravely endangers [the minor's] existence and his goals for the

future. [¶] It is clearly in the best interest of [the minor] that any parental rights that [father] has with respect to this child be terminated. [¶] [Minor's Counsel] has pointed out all three experts agree that [father] is mentally disabled as within the meaning of section 7827. That he is a parent that suffers mental incapacity or disorder that renders him unable care for and control the child adequately. [¶] And in addition, as [petitioner's counsel] has pointed out, is likely to remain so in the foreseeable future. Based upon his history, it's extremely likely that he will continue to be so in the future. [¶] [S]ection 7827 applies to [father]. All experts agree that the best interest of the [the minor] is that the parental rights of [father] be terminated. [¶] . . . [¶] Therefore, the court finds that section 7827 of the Family Code applies to [father] and [father's] parental rights are terminated."

DISCUSSION

A. Standard of Review

In an analogous case in which parental rights were terminated under, inter alia, former Civil Code section 232, subdivision (a)(2),[4] the court stated, "The right of parents to raise their own children is so fundamental that termination of that right by the courts must be viewed as a drastic remedy to be applied only in extreme cases. [Citation.] Accordingly, there must be clear and convincing evidence of the facts necessary to declare minors free from the custody and control of their parents under Civil Code section 232. [Citation.]" (*In re Victoria M., supra*, 207 Cal.App.3d at p. 1326.)

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[4] Former Civil Code section 232, subdivision (a)(2) permitted a trial court to terminate parental rights if the court found by clear and convincing evidence that (1) the child had been neglected or cruelly treated, (2) the child had been a dependent of the juvenile court under Welfare and Institutions Code section 300, and (3) the child had been out of the parents' custody for one year. (*In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1321.) Section 7822 continued former Civil Code section 232, subdivision (a)(2) without substantial change. (Cal. Law Revision Com. com., Deering's Ann. Fam. Code (2013) foll. § 7822.)

The clear and convincing standard, however, applies in the trial court and is not a standard for appellate review. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) "'"The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal." [Citations.]' [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, 'the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*In re Angelique C.* (2003) 113 Cal.App.4th 509, 519.) We review the evidence in the light most favorable to the trial court's judgment, and when there is a conflict in the evidence, we draw all reasonable inferences in support of the trial court's finding. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.) When drawing inferences, we do so only as to those that uphold the decision of the trial court. (*Paine v. San Bernardino Valley Traction Co.* (1904) 143 Cal. 654, 656; see *Lake v. Reed* (1997) 16 Cal.4th 448, 457.) We review de novo the legal issues concerning statutory construction. (See *Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 531.)

B. Failure to Order and Consider Investigation and Report Under Sections 7850 and 7851

Father contends that sections 7850[5] and 7851[6] applied to mother's petition to terminate parental rights and that those sections required the trial court to order a licensed

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[5] Section 7850 provides as follows: "Upon the filing of a petition under Section 7841 [to terminate parental rights], the clerk of the court shall, in accordance with the direction of the court, immediately notify the juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department designated by the board of supervisors to administer the public social services program, who shall immediately investigate the circumstances of the child and

clinical social worker to conduct an investigation and prepare a report for the trial court's consideration. Because the trial court failed to order an investigation and a report by a licensed clinical social worker as required by sections 7850 and 7851, father maintains that the court committed error that was reversible per se.

1. Forfeiture

Because father failed to raise any issue in the trial court concerning either a section 7850 investigation or a section 7851 report, we asked the parties to submit letter briefs on whether father forfeited on appeal his contentions premised on those sections. We conclude that father forfeited on appeal his contentions under sections 7850 and 7851.

The Supreme Court in *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 264-265 explained the basis for the forfeiture rule as follows: "The forfeiture rule generally applies in all civil and criminal proceedings. [Citations.] The rule is designed to advance efficiency and deter gamesmanship. As we explained in *People v. Simon* (2001) 25 Cal.4th 1082 . . . : '"""The purpose of the general doctrine of waiver [or forfeiture] is to

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the circumstances which are alleged to bring the child within any of the provisions of Chapter 2 (commencing with Section 7820)."

[6] Section 7851 provides as follows: "(a) The juvenile probation officer, qualified court investigator, licensed clinical social worker, licensed marriage and family therapist, or the county department shall render to the court a written report of the investigation with a recommendation of the proper disposition to be made in the proceeding in the best interest of the child. [¶] (b) The report shall include all of the following: [¶] (1) A statement that the person making the report explained to the child the nature of the proceeding to end parental custody and control. [¶] (2) A statement of the child's feelings and thoughts concerning the pending proceeding. [¶] (3) A statement of the child's attitude towards the child's parent or parents and particularly whether or not the child would prefer living with his or her parent or parents. [¶] (4) A statement that the child was informed of the child's right to attend the hearing on the petition and the child's feelings concerning attending the hearing. [¶] (c) If the age, or the physical, emotional, or other condition of the child precludes the child's meaningful response to the explanations, inquiries, and information required by subdivision (b), a description of the condition shall satisfy the requirement of that subdivision. [¶] (d) The court shall receive the report in evidence and shall read and consider its contents in rendering the court's judgment."

encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .'" [Citation.] '"No procedural principle is more familiar to this Court than that a *constitutional* right," or a right of any other sort, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." . . .' [Citation.] [¶] 'The rationale for this rule was aptly explained in *Sommer v. Martin* (1921) 55 Cal.App. 603 at page 610 [204 P. 33] . . . : "'In the hurry of the trial many things may be, and are, overlooked which would readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.'"' [Citation.]" (Fn. omitted; [citations].)' [Citation.]"

Father contends that the social worker's investigation and report under sections 7850 and 7851 are not subject to "waiver"[7] because they are jurisdictional, i.e., a trial court is not empowered to terminate parental rights under the Family Code unless it complies with the mandates of those sections. We disagree.

The Supreme Court in *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 56 (*Goddard*) noted, inter alia, that most procedural errors are not jurisdictional. The court said, "[J]urisdictional errors can be of two types. A court can lack fundamental authority over the subject matter, question presented, or party, making its judgment void, or it can merely act in excess of its jurisdiction or defined power, rendering the judgment voidable. [Citations.] . . . [¶] *[M]ost procedural errors are not jurisdictional.*

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[7] "As the United States Supreme Court has clarified, the correct term is 'forfeiture' rather than 'waiver,' because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. [Citations.] As a practical matter, the two terms on occasion have been used interchangeably. [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880, fn.1.) Because the issue is whether father's failure to raise a contention in the trial court precludes him from raising it for the first time on appeal, we use the term forfeiture in analyzing the issue.

[Citations.] Once a court has established its power to hear a case, it may make errors with respect to areas of procedure, pleading, evidence, and substantive law. [Citations.]" (Italics added.) In *Goddard,* the Supreme Court held that Code of Civil Procedure section 594, subdivision (b)—requiring a party who serves the requisite notice of trial to introduce competent evidence of that service at a default prove up trial—was not jurisdictional and therefore was subject to a harmless error analysis. (*Id.* at pp. 52, 58.)

The investigation and report under sections 7850 and 7851 are procedural and evidentiary requirements, much like the evidentiary statute at issue in *Goddard, supra,* 33 Cal.4th 49. Therefore, those provisions are not jurisdictional in either sense described above, and, as a result, we conclude that they are subject to forfeiture.

In this case, the trial court ordered examinations by and considered reports from two psychiatrists and a psychologist. It also appointed separate counsel for the minor and father, as well as a guardian ad litem for father. At no point, however, did father's counsel suggest or imply that an additional investigation and a report from a licensed clinical social worker be ordered, much less suggest that such an investigation and a report were mandatory under sections 7850 and 7851. Had father's counsel requested an investigation and a report, both the trial court and mother's counsel would have had an opportunity to consider and respond to father's request. Because father failed to afford the trial court and mother's counsel that opportunity, he forfeited any issue under sections 7850 and 7851 on appeal.

In his letter brief, father also contends that if we conclude that he forfeited his contentions under sections 7850 and 7851, then he received ineffective assistance of counsel. But father concedes that such a claim is not cognizable on appeal unless the record affirmatively establishes the elements of that claim, citing *In re Daisy D.* (2006) 144 Cal.App.4th 287, 292-293 [to prevail on a claim of ineffective assistance, appellant must show both that counsel's representation fell below prevailing professional norms and that in the absence of counsel's failings, a more favorable result was reasonably probable; unless record affirmatively establishes ineffective assistance, appellate court must affirm judgment]. The record on appeal does not establish that counsel's conduct

fell below prevailing professional norms. The record does not evidence whether there was a satisfactory explanation for counsel's failure to raise the investigation and report issue under sections 7850 and 7851. Perhaps father's counsel concluded that the reports and testimony of the three medical experts were sufficient and that an additional report from a licensed clinical social worker would be cumulative or otherwise not helpful. Moreover, as we hold *post*, sections 7850 and 7851 were not applicable to mother's petition in any event.

2. Applicability of Sections 7850 and 7851 to Mother's Petition Under Section 7827

Even if father had not forfeited his contentions under sections 7850 and 7851, those sections do not apply to mother's petition, which was brought under section 7827.[8] Section 7827 empowers a trial court to terminate parental rights when the parent's mental disability renders him or her unable to care for and control his or her child and the disability is likely to remain so in the foreseeable future. Unlike the other sections of the Family Code that provide for termination of parental rights under various circumstances (§§ 7822-7826[9]), section 7827 is the only provision that specifies that a trial court *must* take expert evidence from two psychiatrists or psychologists and that the trial court *may*, in its sound discretion, take testimony from, inter alia, a licensed clinical social worker. Section 7827 does not mention sections 7850 or 7851, which make an investigation and a report by a licensed clinical social worker mandatory generally in ruling on a petition to

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[8] For the pertinent text of section 7827, see footnote 2, *ante*.

[9] Section 7822 authorizes a petition to terminate parental rights when a child has been abandoned by his or her parent or parents; section 7823 authorizes such a petition when a child has been neglected or cruelly treated by his or her parents; section 7824 authorizes such a petition when a child's parent or parents suffer a disability because of alcohol or controlled substances; section 7825 authorizes such a petition when a child's parent or parents have been convicted of a felony of such a nature so as to prove the unfitness of the parent or parents; and section 7826 authorizes such a petition when a child's parent or parents have been declared by a court of competent jurisdiction to be developmentally disabled or mentally ill.

terminate parental rights under the Family Code. Those sections focus on the child's "circumstances" (§ 7850) and the child's feelings and attitudes (§ 7851), while section 7827 focuses instead on the mental condition of the parent and his or her capacity to care for the child. This suggests that the social worker requirement applies to proceedings under the provisions other than section 7827.

In addition, although section 7827 allows a trial court to consider testimony from a licensed clinical social worker, it expressly provides that such testimony is a matter of discretion, thereby indicating that section 7827 creates an exception to the general rule mandating a report from a licensed clinical social worker if the ground for terminating parental rights is the mental disability of the parent. When a mental disability is the focus of the trial court's inquiry, the legislature required testimony from two psychiatrists or psychologists, but made testimony from a licensed clinical social worker discretionary. In view of the distinguishing features of section 7827, we conclude that the mandatory requirements of an investigation and a report by a licensed clinical social worker under sections 7850 and 7851 were not applicable to mother's petition. If we were to read those mandatory requirements into section 7827, the language in section 7827 concerning the discretionary testimony of a licensed clinical social worker would be either conflicting or superfluous.

3. Prejudice

Even if sections 7850 and 7851 applied to mother's petition, father has failed to demonstrate how the absence of a licensed clinical social worker's investigation and report prejudiced him in this case. Instead, he argues that the trial court's failure to order such an investigation and report was legal error that is reversible per se. But the two cases upon which father relies—*In re Linda W.* (1989) 209 Cal.App.3d 222, 227 and *Neumann v. Melgar* (2004) 121 Cal.App.4th 152, 164-165—do not support his reversible per se contention. *Linda W.* makes no mention of whether the error in that case was reversible per se, and the court in *Neumann* expressly concluded that the "failure to consider the evaluator's [section 7851] report [in that case] was *prejudicial* error."

(*Neumann v. Melgar, supra,* 121 Cal.App.4th at p. 169, italics added.) Thus, the procedural and evidentiary errors of which father complains—failing to order and consider a section 7850 investigation and a section 7851 report—are subject to a harmless error analysis.

"[T]he presumption in the California Constitution is that the 'improper admission or rejection of evidence . . . or . . . any error as to any matter of procedure,' is subject to harmless error analysis and must have resulted in a 'miscarriage of justice' in order for the judgment to be set aside. (Cal. Const., art. VI, § 13.) Code of Civil Procedure section 475 contains similar language: 'The court must, in every stage of an action, disregard any error, improper ruling, instruction, or defect, in the pleadings or proceedings which, in the opinion of the court, does not affect the substantial rights of the parties.'" (*Goddard, supra,* 33 Cal.4th at pp. 56-57.) Thus, for a nonjurisdictional error to result in reversal, there must be a reasonable probability of a different result had the error not occurred. (*Rutheford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 570.)

Because father has failed to demonstrate how he was prejudiced by the trial court's failure to order and consider a section 7850 investigation and a section 7851 report, he has not shown reversible error. Moreover, based on the evidence of father's mental condition, including mother's testimony and the reports and testimony of the experts, there was no reasonable probability that father would have obtained a different result if the trial court had also considered a licensed clinical social worker's investigation and report.

C. Substantial Evidence

Instead of focusing on the applicable standard of review—the substantial evidence standard—father makes policy-based arguments to the effect that termination of parental rights generally must be accompanied by adoption and that public policy disfavors terminating parental rights in cases such as this in which no adoption was contemplated. Even if father's public policy contentions are correct, he nevertheless concedes that

parental rights can be terminated, even if no adoption is contemplated, albeit, he says, only in rare or exceptional circumstances. Thus, the question in this case remains whether there was substantial evidence to support the factual findings underlying the trial court's order terminating parental rights.

Applying the substantial evidence test to the evidentiary record, we conclude that the trial court's findings were factually supported. Under section 7827, the trial court was required to find that father was mentally disabled—unable to care for and control the minor—and that his disability was likely to remain so in the foreseeable future. The trial court made both required findings, and father does not appear to contest the sufficiency of the evidence as to either of those findings.

Instead, father suggests that the trial court failed to make specific findings as to whether, notwithstanding father's disability, termination of his parental rights was in the minor's best interests.[10] The arguments of counsel and the trial court's oral pronouncement of its ruling, however, show that the trial court considered the minor's best interests and concluded that they would best be served by termination of father's rights. It seems axiomatic that if father is mentally disabled so that he is unable to care for or control the child and that this disability would persist for the foreseeable future, the continuation of his parental rights would not be in the child's best interests. As the trial court observed, the minor deserved the stability that would flow from a termination of father's rights, as contrasted with the instability and risk of harm that the minor experienced over the years as father came into and then went out of the minor's life. The trial court further found that it would be detrimental to the minor for father to continue to be in the minor's life and that it was "extremely likely" that father's mental disability would remain for the foreseeable future. Each of those findings was supported by evidence that was reasonable, credible, and of solid value, such that a reasonable trier of fact could conclude based thereon that termination of parental rights was appropriate under the circumstances of this case, regardless of whether an adoption was pending.

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[10] The minor advocated for the termination of father's parental rights in the trial court, and he does not join in father's appeal.

There was substantial evidence demonstrating that this was, as the trial court concluded, the type of "grave" case justifying termination of parental rights.

D. Less Drastic Alternatives

Father's final contention is that the trial court was required to make express findings that no less drastic alternative to termination of parental rights was available. According to father, because the trial court failed to consider less drastic alternatives, the order terminating parental rights must be reversed.

In *In re Cody W.* (1994) 31 Cal.App.4th 221, 228-229, the court explained the evolution of the "least detrimental alternative" concept in the context of terminating parental rights due to the mental disability of a parent. The court said the concept developed at a time when parental rights were terminated immediately and when the current rehabilitation and reunification services were not available. The court quoted from *In re David B.* (1979) 91 Cal.App.3d 184, 196 as follows: "'[T]he judge must carefully explore all reasonable alternatives to severing the parent relationship such as child protective services and temporary foster home care pending efforts to rehabilitate the parent. These alternatives should be employed unless they would result in serious psychological harm to the child. However, if the court determines that available medical and social resources are inadequate to rehabilitate the parent to a level where he or she will be able to assume responsibility for the child, then it becomes inimical to the child's welfare to delay efforts to seek permanent adoptive placement.'" (*In re Cody W., supra*, 31 Cal.App.4th at p. 229.)

The court in *In Re Cody W., supra*, 31 Cal.App.4th 221 further explained that "*In re Angelia P.* (1981) 28 Cal.3d 908 [171 Cal.Rptr. 637, 623 P.2d 198] became a turning point—intentional or not—in the least detrimental alternative analysis. . . . [A]s in the earlier Court of Appeal decisions, the Supreme Court made it clear that 'less severe alternatives' meant no more than giving birth parents the opportunity to rehabilitate themselves and reunite with their families via court-ordered services before ordering the termination of their rights." (*Id.* at p. 229.)

Father does not argue that the trial court should have considered further medical or social services for him to rehabilitate and reunify him with the minor. Instead, he suggests that the trial court should have considered preserving the status quo—i.e., sole custody of the minor vested in mother with no visitation rights for father—based on the speculative hope that father might someday comply with his required treatment and medication regimens and thereafter demonstrate his ability to reunify with the minor at some unspecified level. The trial court expressly found, however, that it was "extremely likely" that father would continue to be mentally disabled for the foreseeable future, a finding that implicitly rejected any alternative based on father's future recovery. Moreover, there was substantial evidence that supported a reasonable inference that father had been afforded fair opportunities to comply with his required medical treatment and that he repeatedly failed to do so.

Father also suggests that the trial court was required to consider father's Social Security survivor benefits, as well as his potential inheritance from his parents, as reasons for not terminating parental rights. According to father, if either he or his parents died prior to the minor reaching adulthood, the minor would be entitled to financial benefits that would be unavailable to him if father's parental rights were terminated. But, there was no evidence that would support an inference that either father or his parents were likely to die prior to the minor reaching adulthood, nor does the record contain any evidence as to the potential amounts of such survivor benefits or the inheritance. Even if a potential inheritance could be of significance, absent such evidence, the trial court was not required to consider father's speculative notions in support of an alternative that would have been less drastic than termination of parental rights. We conclude that there was substantial evidence supporting an implicit finding that less drastic alternatives to termination of parental rights were not available.

DISPOSITION

The order terminating parental rights is affirmed. Each party is to bear his or her own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.